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No. 08-305

IN THE
Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT,
Petitioner,
v.
T.A.,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES IN SUPPORT OF RESPONDENT

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April 1, 2009

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INTERESTS OF AMICUS

The Council of Parent Attorneys and Advocates is an independent, nonprofit organization of 1,200 attorneys, advocates, and parents in 47 States and the District of Columbia who are routinely involved in special education due process hearings throughout the country.[1]

SUMMARY OF ARGUMENT

Petitioner's heavy reliance on this Court's holding in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), would require Congress—and Congress alone—to specify each and every detail, no matter how small, in legislation enacted under the Spending Clause. Nothing in this Court's decisional history supports this expansion of *Pennhurst*.

1a. This Court's cases have applied a "clear-notice" canon of statutory construction where the condition at issue is fundamental and arguably material to a State's decision whether or not to accept federal funds. In keeping with this reasoning, this Court has applied *Pennhurst* where the question at issue was whether to apply or extend an implied right of action, or whether to

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

impose extraordinary relief beyond ordinary contract-style remedies.

This Court has described *Pennhurst* as implementing a contract-law analogy. Although the analogy is imperfect, even contracts do not attempt to address every last permutation of every last factual circumstance. Contracts do not typically spell out each and every available remedy, for example, and they rely on background common-law principles. Moreover, even in contracts, only a few terms are considered "material" such that a breach is grounds for rescinding a contract.

The *Pennhurst* doctrine's contract-law analogy is designed to protect States' ability to make reasoned judgments about whether to accept funds. Of course, contracts impose bilateral obligations. *Pennhurst* is not a license for States to accept funds from the federal government, and subsequently avoid or evade IDEA's basic obligations by conducting a post-hoc search for areas where the State may assert a purported failure of clarity in the text of the statute. *Pennhurst* allows States, having accepted the funds, to raise questions only about terms that are so fundamental that they would reasonably have affected the State's decision to accept money—not about every subsidiary detail.

Petitioner's argument would effectively require Congress to include in its Spending Clause enactments clauses that address every permutation of every factual situation that may arise, to an even greater extent than contracts attempt to do. No contract—and certainly no statute—can cover every specific factual circumstance

or articulate every available remedy and the circumstances in which each of those remedies will be available.

1b. As this Court has noted, States are generally on notice that when they violate a protected individual's clearly-noted federal right, they expose themselves to an appropriate compensatory remedy. The determination of the appropriate ordinary, compensatory remedy is an issue of statutory interpretation and judicial remedial power, not notice. While courts may be required under the *Pennhurst* canon of statutory construction to find clear notice to States that they are subject to extraordinary forms of relief that are not tailored to compensating for the injury suffered as a result of the federal-right violation (such as punitive measures), this Court has previously held that States are on notice of the background principle that violations give rise to ordinary contract-style compensatory remedies. Congress need state nothing further.

2. In any event, the statutory language, combined with the pronouncements from this Court and the executive branch, set forth the availability of tuition reimbursement in cases such this, thus providing clear notice to the States. Having accepted funds with knowledge of the interpretations of the coordinate branches of government, States should not now be able to assert that they did not anticipate being responsible for tuition reimbursement in cases such as the one presented here.

Congress has the legal authority and the practical need to rely on administrative agencies and courts to clarify details of the conditions that States accept along with federal funds. This Court should continue to apply the clear-notice canon of statutory construction in a way that preserves this authority. Here, both the Department of Education and this Court have spoken on the statutory text at issue. In *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985), this Court held that courts have broad authority under the IDEA to craft any remedy in keeping with the purposes of the Act. The Department of Education, following Congress's 1997 amendment of the Act, expressed its interpretation of the statute and of its own regulations, that *Burlington* continues to apply to allow courts to grant students private school tuition reimbursement, even where the student had not previously received special education services from a state agency. *See* Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12,406, 12,602 (Mar. 12, 1999). This Court should recognize that Congress appropriately relies on the coordinate branches of government, and that pronouncements from those branches of government as to the scope of the statute are relevant to any assessment of the scope of the statute and to the States' reasonable expectations.

3. The Court should also be mindful of the dual authorities under which Congress enacted the IDEA: the Spending Clause of Article I and Section 5 of the Fourteenth Amendment. Where Congress utilizes an

amalgamation of its legislative authorities, as is the case with the IDEA, this Court must interpret the legislation in a manner that preserves each of Congress's constitutional authorities. The concerns of the clear-notice canon under the Spending Clause must be balanced with the fact that Congress exercised its Fourteenth Amendment enforcement authority while also providing financial assistance to States. In that context, an expansive application of *Pennhurst* would intrude on, and undermine, Congress's exercise of its Fourteenth Amendment authority.

ARGUMENT

I. THE *PENNHURST* CANON OF STATUTORY CONSTRUCTION DOES NOT APPLY TO THE QUESTION AT HAND.

A. The *Pennhurst* Canon of Statutory Construction Applies in Limited Situations and Does Not Extend to Require Congress to Specify Every Detail.

Petitioner places heavy emphasis on the purported constraints imposed by the IDEA's status as Spending Clause legislation. Petitioner asserts that Congress is bound to expressly state, in the statute itself, each and every detail surrounding the statute. Pet. Br. at 27-28. Petitioner's proposed expansion of *Pennhurst*'s canon of statutory interpretation imposes an unworkable burden on Congress, and is inconsistent with *Pennhurst*'s underlying principles.

In *Pennhurst State School & Hospital v. Halderman* this Court announced a rule of "statutory construction" recognizing that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." 451 U.S. 1, 17 (1981). In order to ensure that the States accept those conditions "voluntarily and knowingly," Congress must impose the condition "unambiguously." *Id.*

The *Pennhurst* principle does not require notice of everything. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183 (2005) (holding that Congress is not required "specifically" to "identify" and "proscribe each condition in [Spending Clause] legislation"). And this Court has denied a strict application of contract-law principles to federal spending legislation. *See Barnes v. Gorman*, 536 U.S. 181, 188-89 (2002) (rejecting the proposition that "suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to all issues that they raise").

Rather, *Pennhurst*'s application depends on the issue at hand. It necessarily applies with greater force when the condition at issue is fundamental and arguably material to a State's decision to accept federal funds. In *Pennhurst*, the Court noted that the canon of statutory construction "applies with greatest force where . . . a State's potential obligations under the Act are largely indeterminate." 451 U.S. at 24. As such, this Court has applied *Pennhurst* mostly in situations where the question at issue had broad implications for the State's potential exposure, including a number of cases

addressing the availability or scope of an implied private right of action.[2] The IDEA, by contrast, sets out the substantive conditions that the States must fulfill, and expressly provides a private right of action. If *Pennhurst* presented the circumstance in which the canon had the greatest force, this case—involving the limited question of whether reimbursement for private school tuition is available in a limited factual scenario—presents a circumstance in which the canon has the least force. Indeed, this Court has rarely applied *Pennhurst* when interpreting the IDEA. *See, e.g., Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005); *Cedar Rapids Comm. Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S.

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[2] *See, e.g.*, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (whether Title IX's implied private right of action extends to claims of retaliation against individual because he has complained about sex discrimination); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (whether there exists private enforceable rights under § 1983 in federal statute that concerns administrative enforcement and does not confer monetary entitlement on litigant); *Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) (whether Title IX's implied private right of action against funding recipients for their own misconduct extends to encompass liability for student-on-student sexual harassment); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (whether Title IX's implied private right of action can be brought against a school district for teacher-student sexual harassment); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992) (whether Title IX's implied private right of action entitles plaintiffs to money damages).

359 (1985); *Smith v. Robinson*, 486 U.S. 992 (1984). The exception to this trend is *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006); but, as explained in Subpart B, the Court's ruling in that case is distinguishable from the case at hand.

Pennhurst's analogy to contract law is consistent with considering the breadth of the question being presented to determine whether Congress must provide explicit notice on the issue. Although the analogy is imperfect, even contracts do not attempt to address every last permutation of every last factual circumstance. For example, contracts do not typically spell out each and every available remedy, and they rely on background common-law principles as default rules. Moreover, in contracts, only a few terms are considered "material" such that they affect the underlying validity of the contract. *See* 23 Richard A. Lord, Williston on Contracts § 63.1 (4th ed. 2002). The *Pennhurst* doctrine is, at its core, designed to address the underlying validity of the relationship entered into between the federal government and the States. *Pennhurst* is premised on the Court's view of the need for States' to be able to make reasoned judgments about whether to accept federal funds. Having accepted the funds, *Pennhurst* allows States to raise questions about terms that are so fundamental that they would reasonably have affected the State's decision to accept money—not questions about every subsidiary detail. *Pennhurst* is not a license for States to accept funds from the federal government, and subsequently avoid or evade IDEA's basic obligations on the ground of an asserted failure of clarity in the text of the statute.

Petitioner's argument would effectively require Congress to include in its Spending Clause enactments clauses that address every permutation of every factual situation that may arise, to an even greater extent than contracts attempt to do. No contract—and certainly no statute—can possibly cover every specific factual circumstance or articulate every available remedy and the circumstances in which those remedies will be available. Requiring Congress to do so would severely undermine Congress's accepted Constitutional authority to promote the general welfare by attaching conditions to the exercise of its Spending Clause authority. *See South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

The issue in this case falls well short of the kind of broad, fundamental issue for which the "clear-notice" principle applies. This case does not involve a question of whether acceptance of the federal funds subjects the recipients to implied rights of action by private parties, *cf. Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992); it does not concern whether these implied rights of action extend to new, previously unaddressed types of conduct, *cf. Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) (applying *Pennhurst* to determine whether Title IX's implied private right of action against funding recipients for their own misconduct extends to encompass liability for student-on-student sexual harassment); and it does not involve questions as to whether, in such lawsuits, the extraordinary remedy of punitive damages may be available, *cf. Barnes v. Gorman*, 536 U.S. 181 (2002).

Instead, the issue here is narrow. It is undisputed that IDEA requires Petitioner to identify children with

disabilities and to provide a free appropriate public education, 20 U.S.C. § 1412(a)(1)(A); that the failure to do so is a breach of its obligations under IDEA; and that courts are explicitly authorized to remedy such violations, 20 U.S.C. § 1415(i)(2)(C)(iii). The only question is whether, in the limited instance in which a school district fails to identify a child with a disability and the child accordingly has not previously received special education services from the school district, the district may avoid responsibility for its failure to provide the services required by IDEA. Whatever the answer to this question,[3] it is a matter of ordinary statutory interpretation; *Pennhurst*'s canon of statutory construction need not be pressed into service.

B. States Are Generally on Notice that Courts Have the Power to Craft an Appropriate Remedy When a Clearly-Noted Federal Right Has Been Violated.

In the context of the IDEA, Congress has expressly set detailed substantive standards and conditions, requiring school districts to identify children with disabilities and to provide those children with a free appropriate public education. Moreover, Congress expressly gave students and parents authority to vindicate the rights created by the statute through an administrative hearing process and subsequent federal court action. To the extent *Pennhurst* requires it, States are generally on notice that they are subject to the broad

[3] Amicus agrees with Respondent that the IDEA provides tuition reimbursement as an available remedy in the circumstances presented by this case.

power of federal courts to award all necessary and appropriate contract remedies where a federal statutory right has been violated.

"[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done," *Bell v. Hood*, 327 U.S. 678, 684 (1946), and the "existence of a statutory right implies the existence of all necessary and appropriate remedies," *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969) (citations omitted). Generally, "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Franklin*, 503 U.S. at 70-71.

In applying the *Pennhurst* principles to Spending Clause legislation, this Court's cases have recognized that Congress need not specify ordinary remedies. In light of the broad power of federal courts to fashion appropriate remedies for violation of federal rights, this Court has held that "[a] funding recipient is generally on notice that it is subject *not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract*." *Barnes*, 536 U.S. at 187 (emphasis added). Congress is therefore under no obligation to provide explicit notice to States of the ordinary contract remedies to which they may be subject.

This Court has applied *Pennhurst* to preclude only extraordinary relief that does not directly address the

harm suffered by the individual whose federal right has been violated, where such relief has not been expressly specified by Congress. Thus in *Barnes v. Gorman*, this Court held that a State could not be subject to punitive damages where Congress had not expressly provided for such extraordinary measures in the statute. 536 U.S. at 187. And in *Arlington Central School District Board of Education v. Murphy*, this Court alluded to the Spending Clause—though it was not central to the Court's holding—in concluding that the a the unusual act of fee-shifting to allow for expert witness fees—a form of relief not ordinarily available in federal court—was not within the definition of "costs" in the IDEA. 548 U.S. at 302-03. The clear-notice canon does not, however, require Congress to state with clarity the kind of standard remedy at issue in this case. *See Bell v. New Jersey*, 461 U.S. 773, 790 n.17 (noting that *Pennhurst* does not necessarily apply to legislation setting forth "the remedies available against a noncomplying state").

Private school tuition reimbursement is a standard, contract-law remedy. It satisfies the expectation interests of the student by placing him in as good a position as he would have been in had the school district fulfilled its federal obligation to provide a free appropriate public education. *See* 24 Richard A. Lord, Williston on Contracts § 64:2 (4th ed. 2002). It is therefore distinguishable from forms of relief such as the punitive damages at issue in *Barnes* and the fee-shifting measure at issue in *Arlington*. Neither punitive damages nor expert witness fees are remedies sounding in contract. Private school tuition reimbursement is, and *Pennhurst* does not require Congress to clearly state its availability. Indeed, in originally recognizing private

school tuition reimbursement as an appropriate remedy under the IDEA, this Court conducted no Spending Clause analysis at all. *See Burlington*, 471 U.S. 359.

II. ANALYSIS OF CONGRESS'S SPENDING CLAUSE POWER MUST CONSIDER THE ROLE OF AND STATEMENTS FROM THE COORDINATE BRANCHES OF GOVERNMENT.

A. Congress Necessarily Legislates Broadly.

By requiring an undue level of specificity in Spending Clause legislation, Petitioner's approach would effectively deprive Congress of its recognized authority to delegate to federal agencies "the sort of intricate, labor intensive task for which delegation to an expert body is especially appropriate," *Mistretta v. United States*, 488 U.S. 361, 379 (1989), and to "obtain[] the assistance" of the Executive Branch of government in articulating the conditions that attach to the grant of federal funds, *id.* at 372. Indeed, "[o]nce it is conceded, as it must be, that no statute can be entirely precise, and that some judgments . . . must be left to the officers executing the law and to the judges applying it," *id.* at 415 (Scalia, J. concurring), applying *Pennhurst*'s clear-notice requirement to every instance of Spending Clause statutory interpretation would seriously undermine Congress's ability to exercise its constitutionally assigned duties.

Petitioner's assertion that *Pennhurst* requires Congress to specify with precision, in the statute itself, the precise circumstances in which an ordinary remedy

is available for an admitted breach, imposes an unworkable standard and implies that interpretations and conditions set out by the executive branch, and known to the States when they made the decision to accept the funds Congress offered to them, have no legal bearing. This position is untenable and would effectively deprive Congress of the ability to enact Spending Clause legislation and delegate to the executive branch the authority to fill in the details, even as Congress has recently passed legislation providing significant funding to States and localities with conditions to be specified by the executive branch. *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

B. The Courts and the Department of Education Have Specified That Tuition Reimbursement is an Available Remedy.

Petitioner relies heavily on the text of the statute in conducting its *Pennhurst* analysis. *See* Pet. Br. 23-25. As discussed above, however, this Court has recognized the important role of courts and administrative agencies. This Court and the executive branch have set forth States' obligations with precision, and the States were on notice of them. Having accepted funds with knowledge of the interpretations of the coordinate branches of government, States cannot now assert that they did not anticipate being responsible for tuition reimbursement in cases such as the one presented here.

In *School Committee of Town of Burlington, Massachusetts v. Department of Education of Massachusetts*, 471 U.S. 359 (1985), this Court held that, under § 1415(e)(2) of the IDEA, parents are entitled to be reimbursed for reasonable costs of a unilateral placement where a free appropriate public education is not available and the alternate placement is ultimately determined to be proper. In reaching this conclusion, the Court noted that the statute

> confers broad discretion on the court. The type of relief is not further specified, except that it must be "appropriate." Absent other reference, the only possible interpretation is that the relief is to be "appropriate" in light of the purposes of the Act.

Id. at 369. The Court noted that an injunction directing a school district to develop an appropriate individualized education program ("IEP") is not likely to be effective because a final judicial decision is likely to come "a year or more after the school term covered by that IEP has passed." *Id.* at 370.

The Court subsequently confirmed this decision in *Florence County School District Four v. Carter*, 510 U.S. 7, 15 (1993) ("[O]nce a court holds that the public placement violated IDEA, it is authorized to 'grant such relief as the court determines is appropriate.'") (quoting 20 U.S.C. § 1415(e)(2)). This line of authority has stood for over twenty years.

The statutory language, combined with the consistent case law interpreting it as authorizing tuition reimbursement as a remedy for violations, is more than sufficient to establish that States had "clear notice" not only of their obligation to provide a free appropriate public education, but also the potential that school districts would be liable for the costs of private school tuition. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 182 (2005) (finding that the Board of Education was on notice of its liability based on decisions of the U.S. Supreme Court and federal appellate courts); *see also Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 303 (2006) (relying on the Court's prior case law to conclude that States did not have clear notice).

Congress may, of course, overrule or alter the Court's interpretations of statutory language; however, the Court presumes that if Congress "intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *MidAtlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986). If Congress had intended to repeal the longstanding interpretation of IDEA reflected in *Burlington* and *Carter*, it "likely would have flagged that substantial change." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 62 (2004). Congress did not indicate any such intent. Congress did not revise the text of § 1415(i)(2)(C)(iii), which remains unchanged from the language this Court interpreted in *Burlington* and *Carter*. Neither the text nor the legislative history of the 1997 amendments mentions any intent to eliminate the Court's ability to order tuition reimbursement in appropriate cases in which a child had

not previously received special education and related services from a school district.

After the 1997 amendments, the United States Department of Education expressly considered and rejected the very argument that Oregon makes in this case, and told States seeking federal funding that they could continue to be liable for tuition reimbursement. The Department said in the comments to regulations that:

> [H]earing officers and courts retain their authority recognized in *Burlington* and [*Carter*] to award "appropriate" relief if a public agency has failed to provide FAPE, *including reimbursement and compensatory services*, under section 615(l)(2)(B)(iii) *in instances in which the child has not yet received special education and related services*. This authority is independent of their authority under section 612(a)(10)(C)(ii) to award reimbursement for private placements to children who previously were receiving special education and related services from a public agency.

Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12,406, 12,602 (March 12, 1999) (emphasis added).

The Department of Education reiterated this view in a published letter stating that "[w]e do not view 612(a)(10)(C) as foreclosing categorically an award of

reimbursement in a case in which a child has not yet been enrolled in special education and related services under the authority of a public agency." *See* Letter from the Department of Education to Susan Luger, listed in 65 Fed. Reg. 9178 (Feb. 23, 2000) and quoted in *Application of a Child with a Disability*, Appeal No. 06-021 (Apr. 25, 2006), *available at* http://www.sro.nysed.gov/2006/06-021.htm.

This Court has previously taken into account the statements of the executive-branch agency charged with administering the statute. In *Pennhurst*, this Court signaled the relevance of statements from the executive branch by concluding that:

> it strains credulity to argue that participating States should have known of their 'obligations' under Section 6010 when the Secretary of HHS . . . has never understood Section 6010 to impose conditions on participating States.

Id. at 25.

In *Jackson* this Court concluded that grant recipients were on notice of the relevant obligations, based in part on the existence of administrative regulations promulgated by the Department of Education in the Title IX context. 544 U.S. at 182. In *Arlington*, the Court implicitly suggested that an executive branch agency's statements could provide the required notice. In that case, the Court concluded that a statement by the Government Accountability Office was not relevant to the "clear notice" analysis, in part because it was made

"by an agency not responsible for implementing the IDEA." *Arlington*, 548 U.S. at 303 n.3.

In this instance, Congress charged the U.S. Department of Education with administering and enforcing IDEA. 20 U.S.C. § 1402(a). The Department of Education concluded that Congress had not eliminated the courts' ability to remedy violations when a child with disabilities had not previously received special education services from the State, 20 U.S.C. § 1406(b), and announced this interpretation in the Federal Register for all States and school districts to see.

As a result, Oregon accepted federal funds with full notice that the Court and the Department of Education—the executive branch agency to which Congress delegated authority to implement IDEA, and to which this Court defers in reasonable interpretations of federal statutes, *see, e.g., Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)—had concluded that courts could continue to remedy school districts' violations of the IDEA by ordering the district to reimburse private school tuition.

In the face of the statute's broad remedial provision, this Court's case law interpreting that provision, and the explicit statement by the U.S. Department of Education, a reasonable State and school district would have understood that they would be liable for tuition reimbursement in the circumstances presented in this case.

III. BECAUSE THE IDEA WAS ENACTED PURSUANT TO BOTH THE SPENDING CLAUSE AND SECTION FIVE OF THE FOURTEENTH AMENDMENT, ANY APPLICATION OF *PENNHURST* MUST BE LIMITED.

Petitioner also disregards Congress's independent, underlying authority to enact the IDEA pursuant to Section 5 of the Fourteenth Amendment. This Court has recognized that Congress may use more than one constitutional provision as the source of its legislative authority. *See Fullilove v. Klutzinck*, 448 U.S. 448, 473 (1980) ("In enacting the [Minority Business Enterprise] provision [of the Public Works Employment Act], it is clear that Congress employed an amalgam of its specifically delegated powers," including its spending power and its enforcement power.). Congress exercised its authority under Section 5 of the Fourteenth Amendment to the Constitution to enact legislation enforcing equal educational opportunity for children with disabilities. Thus, this Court should apply *Pennhurst* in a manner that recognizes and preserves Congress's power to legislate pursuant to the Fourteenth Amendment.

In addition to recognizing that IDEA was enacted pursuant to Congress' authority under the Spending Clause, *see, e.g.*, *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 51 (2005), this Court has previously recognized that the IDEA was also an exercise of Congress' Fourteenth Amendment authority. The Fourteenth Amendment protects individual rights to equal protection of the law against violation by state actors.

Section 5 gives Congress the power to enforce the provisions of the Amendment.[4]

Congress may employ "an amalgam of its specifically delegated powers," *Fullilove,* 448 U.S. at 473, and may impose conditions in connection with the exercise of its spending authority that are within other legislative authorities. *See, e.g.*, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* ("*FAIR*"), 547 U.S. 47, 58 (2006) ("Although Congress has broad authority to legislate on matters of military recruiting, it nonetheless chose to secure campus access for military recruiters indirectly, through its Spending Clause power."). In *FAIR*, the Court granted its traditional deference to Congress in military matters, even though the statute at issue was also enacted under the Spending Clause. *Id.*

In this instance, Congress utilized an amalgamation of its Spending Clause and Fourteenth Amendment

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[4] The Fourteenth Amendment provides in relevant part:

> Section 1 . . . No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.
>
> ***
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV, §§ 1, 5.

authorities in enacting the IDEA and its predecessor, the Education of the Handicapped Act ("EHA"); as a result, a stringent application of the clear-notice canon of statutory construction is particularly unwarranted.

As the Court observed in *Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley*, "Congress sought 'to provide assistance to the States in carrying out their responsibilities under . . . the Constitution of the United States to provide equal protection of the laws.'" 458 U.S. 176, 198 (1982) (quoting S. Rep. No. 94-168 at 13 n.22 (1975)). This Court further recognized the Fourteenth Amendment underpinnings of the statute two years later in *Smith v Robinson*, 468 U.S. 992, 1009 (1984) ("We have little difficulty concluding that Congress intended the EHA to be the exclusive avenue through which a plaintiff may assert an *equal protection claim* to a publicly financed special education.") (emphasis added); *see also Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 305 (2006) (Ginsburg, J., concurring) ("IDEA was enacted not only pursuant to Congress' Spending Clause authority, but also pursuant to § 5 of the Fourteenth Amendment."). In *Smith*, the Court explained that the EHA was

> an attempt to relieve the fiscal burdens placed on States and localities by their responsibility to provide education for all handicapped children. At the same time, however, *Congress made clear that the EHA is not simply a funding statute. The responsibility for providing the required education remains on the States*. And the Act establishes an

> enforceable substantive right to a free appropriate public education.

Smith, 468 U.S. at 1010 (citing S. Rep. No. 94-168, at 6 (1975) and *Rowley*, 458 U.S. 176 (1982)) (emphasis added). The EHA was a "comprehensive scheme set up by Congress to aid the States in complying with their constitutional obligations to provide public education for handicapped children." *Id.* at 1009.

Congress's reliance on the Fourteenth Amendment is reflected in the history and text of the IDEA. Specifically, Congress found that

> [w]hile States, local education agencies, and educational service agencies are primarily responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and *to ensure equal protection of the law*.

20 U.S.C. § 1400(c)(6) (emphasis added); *see also id*. § 1400(c)(7) ("A more equitable allocation of resources is essential for the Federal Government to meet its responsibility to provide an *equal educational opportunity* for all individuals.") (emphasis added). Congress acknowledged that it must

> take a more active role under its responsibility for equal protection of the

> laws to guarantee that its responsibility for *equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity*.

S. Rep. No. 94-168, at 9 (1975), as reprinted in 1975 U.S.C.C.A.N. 1425, 1433 (emphasis added).

In enacting the statute in 1975, Congress cited the landmark cases, *Pennsylvania Association for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D.Pa. 1971) and 343 F. Supp. 279 (E.D. Pa. 1972), and *Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), which applied the Fourteenth Amendment to require the provision of an appropriate public education to children with disabilities. Prior to the enactment of the EHA, one million children with disabilities were entirely excluded from public schools. 150 Cong. Rec. S. 5250, 5326 (daily ed. May 12, 2004 (statement of Sen. Harkin); *see also* 20 U.S.C. § 1400(c)(2)(B); 150 Cong. Rec. S. 5394, 5408 (daily ed. May 13, 2004) (statement of Sen. Bingaman).

At the time it enacted the EHA, Congress noted that

> this Nation has long embraced a philosophy that *the right to a free appropriate public education is basic to equal opportunity* and is vital to secure the future and the prosperity of our people. It is contradictory to that philosophy when that right is not assured equally to all groups of people within the Nation. Certainly the failure to provide a right to

> education to handicapped children cannot be allowed to continue.

S. Rep. No. 94-168, at 9 (1975), as reprinted in 1975 U.S.C.C.A.N. 1425, 1433 (emphasis added).

The Court should apply the *Pennhurst* clear-notice canon in a manner that will preserve Congress' ability to exercise its Fourteenth Amendment authority. In *Pennhurst*, the Court noted that legislation enacted pursuant to the enforcement power of the 14th Amendment imposes *involuntary* obligations on States, in contrast to obligations voluntarily assumed by accepting federal funds. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981).

> Unlike legislation enacted under § 5, however, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State *voluntarily and knowingly* accepts the terms of the "contract."

Id. at 17 (emphasis added). Here, Congress chose to use its Spending Clause authority to assist in the enforcement of the Fourteenth Amendment.

The Fourteenth Amendment adds an additional essential "layer" to IDEA that is not present in pure Spending Clause legislation. Where Congress chooses

to provide funding to assist States in meeting the requirements of the Fourteenth Amendment, the rationale for *Pennhurst's* clear-notice rule must be reconciled with Congress's authority to impose obligations on the States through its Fourteenth Amendment powers. If the Court were to apply *Pennhurst* as if this were strictly a Spending Clause case, it would unduly constrain Congress' ability to provide financial assistance to States to assist them in meeting obligations that Congress could have imposed directly.

CONCLUSION

For the foregoing reasons, amicus requests that this Court affirm the decision of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Dated April 1, 2009